

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs August 7, 2007 at Jackson

STATE OF TENNESSEE v. ELTON E. SMITHEY

Appeal from the Circuit Court for Rutherford County
No. F-55917 James K. Clayton, Jr., Judge

No. M2007-00263-CCA-R3-CD - Filed October 19, 2007

The defendant, Elton E. Smithey, pleaded guilty to two counts of attempted aggravated sexual battery in exchange for an effective six-year sentence to be served as one year of confinement followed by probation. Two years later, the trial court revoked the defendant's probation. The defendant appeals the revocation, and we affirm.

Tenn. R. App. P. 3; Judgment of the Trial Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which DAVID H. WELLES, and D. KELLY THOMAS, JR., JJ., joined.

Gerald L. Melton, District Public Defender, and Russell N. (Rusty) Perkins, Assistant District Public Defender, for the appellant, Elton E. Smithey.

Robert E. Cooper, Jr., Attorney General & Reporter; Lacy Wilber, Assistant Attorney General; William C. Whitesell, Jr., District Attorney General; and Laural A. Nutt, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The defendant pleaded guilty to two counts of attempted aggravated sexual battery on January 11, 2005. Pursuant to a plea agreement with the State, the defendant received an effective sentence of six years to be served as one year of incarceration followed by probation. On February 12, 2006, the trial court revoked his probation and ordered him to serve six months in confinement and then return to probation. On July 5, 2006, the State filed a violation report alleging that the defendant had failed to maintain steady, lawful employment; had failed to pay his fees and court costs and was more than \$3,000 in arrears; and had failed to enroll in a sex offender treatment program as required by the terms of his probation.

At the probation revocation hearing, Kelly Morris, the defendant's probation officer, testified that the defendant, who had initially been supervised in Rutherford County, requested that

his supervision be transferred to Wilson County in April 2006. During their first meeting in April, Mr. Morris discussed the terms of probation with the defendant and reminded him that he was required to maintain steady employment, remain current on his fees and costs, and enroll in a sex offender treatment program. Mr. Morris testified that despite his repeated requests and despite the defendant's assertion that he was employed, the defendant failed to provide proof of employment. During cross-examination, Mr. Morris conceded that he could not say with certainty that the defendant was not employed at the time of the filing of the warrant, only that he had not provided verification of his employment.

Emphasizing that "the main basis for the warrant was the sex offender treatment," Mr. Morris stated that although he gave the defendant a list of treatment providers and contact information, the defendant had taken no steps to enroll in treatment. Mr. Morris stated that he was unaware of whether the defendant had completed his psychosexual evaluation, as there was no record of the evaluation in his probation file. The defendant told Mr. Morris that he "had made a couple of phone calls" but had not enrolled in treatment because he had no transportation. As of July 28, the defendant still had not provided verification of his employment or enrolled in sex offender treatment. In addition, the defendant had failed to make any payment toward his probation fees and/or court costs during the entire time he was supervised in Wilson County and was in arrears \$180 in fees and \$3,010.50 in court costs.

The defendant testified that during the time he was supervised in Wilson County, he worked at Steve's and Sons Doors, Save-A-Lot, and The Lebanon Democrat. He stated that he specifically recalled showing his pay stubs to Mr. Morris and claimed that his longest period of unemployment was two weeks. The defendant blamed his failure to pay fees and costs on "a slip of the mind." He claimed that he had been enrolled in sexual offender treatment at The Guidance Center in Murfreesboro prior to requesting that his probation be transferred to Wilson County. The defendant denied that Mr. Morris had given him contact information for treatment providers and stated his desire to enroll in treatment. The defendant conceded that he knew it was his responsibility to enroll in treatment but stated that "the ball was in [Mr. Morris's] court" once he indicated a desire to attend.

At the conclusion of the hearing, the trial court revoked the defendant's probation based upon a finding that the defendant "just hasn't done what he was supposed to have done."

A trial court may revoke a sentence of probation upon a finding by a preponderance of the evidence that the defendant has violated the conditions of his release. T.C.A. § 40-35-311(e) (2006); *Stamps v. State*, 614 S.W.2d 71, 73 (Tenn. Crim. App. 1980). A revocation will be upheld absent a showing that the trial court abused its discretion. *State v. Harkins*, 811 S.W.2d 79, 82 (Tenn. 1991). In order to establish that the trial court has abused its discretion, the defendant must show that there is no substantial evidence to support the determination that he violated his probation. *Id.* (citing *State v. Grear*, 568 S.W.2d 285, 286 (Tenn. 1978); *State v. Delp*, 614 S.W.2d 395, 398 (Tenn. Crim. App. 1980)). Relief will be granted only when "the trial court's logic and reasoning was improper when viewed in light of the factual circumstances and relevant legal principles

involved.”” *State v. Shaffer*, 45 S.W.3d 553, 555 (Tenn. 2001) (quoting *State v. Moore*, 6 S.W.3d 235, 242 (Tenn. 1999)). Upon finding a violation, the trial court may “revoke the probation and suspension of sentence and cause the defendant to commence the execution of the judgment as originally entered.” T.C.A. § 40-35-311(e). Furthermore, when probation is revoked, “the original judgment so rendered by the trial judge shall be in full force and effect from the date of the revocation of such suspension.” *Id.* § 40-35-310. The trial judge retains the discretionary authority to order the defendant to serve the original sentence. *See State v. Duke*, 902 S.W.2d 424, 427 (Tenn. Crim. App. 1995).

Here, the record establishes that the defendant failed to pay his court costs and fees as required by the terms of his probation. The defendant admitted that he had failed to pay, stating that he had “a slip of the mind.” The record also supports a finding that the defendant failed to enroll in sex offender treatment. Although the defendant indicated a willingness to enter treatment, willingness alone is not sufficient to fulfill the terms of his probationary sentence. The duty is upon the defendant to comply with the rules of his probation. The trial court did not abuse its discretion by revoking the defendant’s probation.

Accordingly, the judgment of the trial court is affirmed.

JAMES CURWOOD WITT, JR., JUDGE